



OFFICE OF THE DEPUTY COMMISSIONER - LEGAL MATTERS

LEGAL BUREAU BULLETIN

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- I. SUBJECT:** CONFIDENTIAL INFORMANTS
- II. QUESTION:** WHAT ARE THE LEGAL REQUIREMENTS FOR USE OF A CONFIDENTIAL INFORMANT AND WHAT LEGAL PROTECTIONS SAFEGUARD CONFIDENTIAL INFORMANTS?
- III. ANSWER:** OFFICERS MUST (1) COMPLY WITH ORDINARY RULES OF CRIMINAL PROCEDURE WHEN USING A CONFIDENTIAL INFORMANT AND (2) BE CANDID WITH THE PROSECUTOR REGARDING USE OF A CONFIDENTIAL INFORMANT DURING AN INVESTIGATION. THE COURT WILL ONLY ORDER DISCLOSURE OF INFORMATION REGARDING THE CONFIDENTIAL INFORMANT IN LIMITED CIRCUMSTANCES.
- IV. DISCUSSION:**

A. Introduction

New York courts have consistently recognized the important role confidential informants play in law enforcement investigations of a wide range of criminal activity.¹ In order to ensure that the valuable information provided by confidential informants leads to successful prosecutions, officers must be candid with the Assistant District Attorney ("ADA") prosecuting the case regarding the fact that a confidential informant supplied information during the investigation.

¹ A confidential informant, as defined by the Patrol Guide, is "[a]n individual approved by the Department and registered with the Intelligence Bureau who provides useful and credible information to the contact regarding criminal activities, and from whom the contact expects or intends to obtain additional useful and credible information regarding such activities in the future." Procedure No. 212-68, p. 1. Officers are reminded that they may only use confidential informants registered with the Department, and that the "[u]se of unregistered informants may result in disciplinary action." *Id.*

Recognizing the need to protect the safety of confidential informants, New York courts have afforded confidential informants certain legal safeguards. These protections, which are discussed below, provide further assurance that candor with the ADA will not compromise the security of a confidential informant or his or her viability in future investigations. Additionally, officers receiving information from informants must comply with certain legal requirements, also discussed in this Bulletin.

B. Candor with the ADA and Legal Safeguards Protecting Confidential Informants

Often, officers are concerned that disclosure of the identity of a confidential informant to the District Attorney's Office may jeopardize the safety of the informant and the officers' ability to rely on the informant in future criminal investigations. While such concerns are understandable, the judicial system has in place several safeguards to protect the identity and security of confidential informants.

For instance, in cases in which a confidential informant provided information that formed, in whole or in part, the basis for probable cause to arrest the defendant and to conduct a subsequent search of his person or of a location, the informant's identity and information need not always be disclosed to the defense. The Court, in considering a defendant's pretrial motion to suppress evidence, will often decide the motion to suppress in a closed hearing at which the defendant and his attorney are not present. Instead, the defendant and his attorney submit questions before the hearing for the Court to ask during the closed hearing.² Such a hearing is known as a "Darden hearing"³ and is conducted upon an application by the prosecutor that demonstrates to the Court that disclosure would endanger the informant and compromise law enforcement operations. The purpose of this hearing is to satisfy the Court that the confidential informant existed and provided sufficient reliable information to the arresting officers to amount to probable cause.

The law provides additional safeguards to protect confidential informants where the defendant requests disclosure of the identity of a confidential informant for purposes of trial. While the courts recognize that the prosecution has an obligation "to disclose to a defendant evidence and potential witnesses" who "may establish [the defendant's] innocence," this right is not absolute, particularly where a potential witness is a confidential informant.⁴ As such, the defendant has the burden of establishing the need for disclosure of a confidential informant's identity and information. The defense must establish for the Court that the confidential informant's testimony will be relevant and helpful to the defense and will "clearly play a decisive role in resolving a very colorable factual dispute" at trial.⁵ In attempting to meet this burden, the defendant must present more than "[b]are assertions or conclusory allegations" that a confidential informant witness is necessary to establish the defendant's innocence.⁶ Instead, the defendant must demonstrate that his request for information regarding the confidential informant's identity has a factual basis, "does

² Edwards, 2007 U.S. Dist. LEXIS 46563 at n. 1 (citing People v. Darden, 34 N.Y.2d 177, 181 (1974)).

³ Darden, 34 N.Y.2d at 177.

⁴ People v. Goggins, 34 N.Y.2d 163, 168-69 (1974).

⁵ Id. at 172.

⁶ Id. at 169.

not have an improper motive and is not merely an angling in desperation for possible weaknesses in the prosecution's investigation."⁷ In determining whether the defendant has met this burden, the court will assess the extent of the confidential informant's role in the crime at issue, such as whether he was an eyewitness to or an active participant in the crime or merely provided a tip leading to police action.⁸ In other words, the more significant the confidential informant's role in the investigation, the greater the likelihood that the court will order disclosure of his or her identity.

In light of these legal safeguards, officers should not be reluctant to provide information relating to a confidential informant to the prosecuting ADA. Rather, when the assigned ADA asks an officer whether he or she relied on a confidential informant during the course of a criminal investigation, officers must answer truthfully. Defense attorneys are often able to obtain information about a criminal investigation independently from the prosecutor. Therefore, a defense attorney may be aware that a confidential informant supplied information to the police or may correctly surmise this based on the facts of the case, even if the ADA neither possessed nor disclosed this information. In this instance, if an officer does not inform the prosecutor of the existence of a confidential informant – or, worse, untruthfully denies that he or she relied on a confidential informant as part of the investigation – this will result in seriously negative consequences to the prosecution at a hearing or at trial. Notably, courts have precluded testimony or evidence from being introduced or have dismissed criminal charges outright under these circumstances. A court may dismiss a case in its entirety under these circumstances, *even if* the officer had probable cause to arrest the suspect independent of the information supplied by the confidential informant. Further, an officer's misrepresentation to the court regarding the existence of a confidential informant may negatively impact the officer in future prosecutions; specifically, such conduct may lead to an adverse credibility finding by the criminal court against the officer, which may be raised in subsequent unrelated court proceedings.⁹

Similarly, if an officer performs his or her duty to disclose to the ADA that he or she worked with a confidential informant, the officer does not have the discretion to request that the ADA refrain from disclosing this information to the court and/or provide a categorical assurance that the confidential informant will never have to testify. Making these requests hinder the ADA's successful prosecution of the criminal case, and may result in (1) the court dismissing the case in its entirety or (2) the ADA declining to prosecute the case. For these reasons, the officer must work cooperatively with the ADA in furthering both goals: protecting the confidential informant pursuant to the above legal principles while ensuring that the case is proven beyond a reasonable doubt. Providing the ADA with extensive information about the background of the defendant and his or her associates, the extent of the risk to the confidential informant from disclosure and the way in which disclosure will negatively impact ongoing law enforcement efforts are among the ways that an officer can further this joint effort.

⁷ Id.

⁸ Id. at 169-70.

⁹ For a more thorough discussion of adverse credibility findings, specifically their potential use in future legal proceedings, refer to Legal Bureau Bulletin Volume 47, No. 1, entitled "Cross-Examination of Police Witnesses."

To reiterate, the court will make a determination as to whether information pertaining to a confidential informant must be disclosed to defense counsel. In making that determination, the court carefully considers the risk to law enforcement. In the Darden context specifically, the courts are generally deferential to the prosecutor's request that confidential informant information not be disclosed. As such, an officer should not fear disclosure to the ADA.

C. Legal Requirements for Use of Confidential Informants

While confidential informants are an important law enforcement tool, officers must remember that confidential informants may not be used to circumvent the criminal procedure rules that apply to ordinary law enforcement investigations. Below are several guiding principles to ensure that the use of a confidential informant is consistent with the Criminal Procedure Law.

1. Right to Counsel

The principles pertaining to a suspect's and/or criminal defendant's right to counsel extend to questioning by a confidential informant. On occasion, confidential informants speak to suspects who have been charged with a crime for which the indelible right to counsel has attached. By way of reminder, the indelible right to counsel attaches where (1) a suspect in custody unequivocally requests an attorney, (2) an attorney notifies police that he/she has entered the criminal matter on behalf of the suspect, or (3) once a formal criminal proceeding begins, e.g. a suspect has been formally charged in an indictment or criminal complaint that is filed in court, the defendant is arraigned, or an arrest warrant has been obtained. When a confidential informant is acting on behalf or at the direction of law enforcement, his or her ability to speak to a defendant or suspect mirrors that of a law enforcement officer regarding the defendant or suspect's right to counsel. Thus, once a recently arrested and charged defendant has been released on bail or his own recognizance, a confidential informant may only speak to and/or surreptitiously question a suspect about a new crime or crimes unrelated to those with which he has been charged and to which the indelible right to counsel has attached.¹⁰ In order to further ensure that the right to counsel is not violated through the use of a confidential informant, officers should first instruct the confidential informant not to question or deliberately elicit from the suspect information about the crime for which the right to counsel has attached.¹¹ On the other hand, as is the case with spontaneous statements made to law enforcement, spontaneous statements made to confidential informants about the crime or crimes for which the right to counsel has attached may ultimately be used by the prosecution.¹²

¹⁰ See People v. Otero, 486 N.Y.S.2d 825, 826 (Sup. Ct. Kings Cty. 1985) ("[T]he counsel rights of an indicted suspect are not violated when he is questioned surreptitiously in the course of an undercover investigation of a new crime, so long as the questioning is legitimately related to the new crime") (citing People v. Mealer, 57 N.Y.2d 214 (1982) (internal quotation marks omitted)).

¹¹ Id. ("[The informant] was instructed not to question or deliberately elicit from defendant information about the murder, but simply to give him an opportunity to reiterate the bribe offer [underlying the uncharged crime officers were investigating].").

¹² The standard for what constitutes a "spontaneous statement" in the right to counsel context is that "the spontaneity has to be genuine and not the result of inducement, provocation, encouragement, or acquiescence, no matter how subtly employed." People v. Maerling, 46 N.Y.2d 289, 303 (1978).

2. Entries and Searches

Officers may not direct a confidential informant to engage in conduct that would be unconstitutional if conducted by a law enforcement officer. Similarly, if an officer learns that a confidential informant has committed an unlawful act during the course of a criminal investigation, he or she is required to deactivate the confidential informant.¹³ Moreover, if the confidential informant is participating in a criminal investigation pursuant to a written agreement with the prosecutor's office, a confidential informant will be in violation of said agreement if he or she commits any crimes for the duration of his cooperation with the prosecutor's office; such violation will result in direct legal consequences for the confidential informant under the agreement.

Examples of unconstitutional conduct by a confidential informant include, but are not limited to, the following:

- Entering a home or property of a suspect/criminal defendant without the consent from the suspect/criminal defendant or person with apparent authority to consent to entry or a search,
- Entering areas within a home or property that exceeds the scope of consent provided by the suspect/criminal defendant or person with apparent authority to consent to entry or a search, and
- Engaging in illegal eavesdropping and/or eavesdropping.

V. CONCLUSION

While confidential informants receive substantial protection under the law, officers may nonetheless have justifiable concerns that disclosure of confidential informant-related information may compromise an investigation or, perhaps more importantly, the safety of a confidential informant. Officers having any such concerns are encouraged to contact the Legal Bureau at (646) 610-5400 to discuss how to proceed. Officers should also contact the Legal Bureau if they have any questions regarding the permissible use of a confidential informant in an investigation.

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¹³ See Patrol Guide Procedure No. 212-68, p. 4 (directing officers to deactivate a confidential informant if the informant "[b]ecomes involved with criminal activity while not under the direction and supervision of the contact or supervisor and such involvement compromises the informant's ability to function as a confidential informant for this Department").

